

EX PARTE OR LATE FILED

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526
Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: 202-828-2226
A5691.482

RECEIVED

SEP 6 - 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

September 6, 1996

BY COURIER

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

**EX PARTE
PRESENTATION**

Re: **Implementation of the Pay Telephone Reclassification and
Compensation Provisions of the Telecommunications Act
of 1996, CC Docket No. 96-128**

Dear Mr. Caton:

Enclosed for filing in this docket are the original and one copy of a letter to John Muleta on behalf of the American Public Communications Council relating to the definition of "fair compensation." I would ask that you include these materials in the record of this proceeding.

If you have any questions concerning this matter, please contact me at (202) 828-2226.

Thank you for your consideration.

Sincerely,



Albert H. Kramer

AHK/nw

cc: J. Muleta	R. Spangler
M. Carowitz	R. Baca
M. Richards	D. Gonzalez
P. DeGraba	K. Gulick
G. Rosston	J. Nakahata

021

D I C K S T E I N S H A P I R O M O R I N & O S H I N S K Y L L P

2101 L Street NW • Washington, DC 20037-1526

Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: 202-828-2226

A5691.482

September 6, 1996

EX PARTE PRESENTATION

Mr. John B. Muleta
Federal Communications Commission
2025 M Street, NW
Room 6010
Washington, D.C. 20037

Re: **Implementation of the Pay Telephone Reclassification and
Compensation Provisions of the Telecommunications Act of
1996, CC Docket No. 96-128**

Dear Mr. Muleta:

This letter responds to your request for the view of the American Public Communications Council ("APCC") on the meaning of "fair compensation." We believe this issue must be addressed in at least two contexts. The first context is the conceptual/economic one, and the second context is the legal one.

At the conceptual/economic level, APCC is in essential agreement with the RBOC Payphone Coalition. In their Comments, the RBOC Payphone Coalition concluded that the market can best determine the rate at which payphone providers are "fairly compensated" for the use of their payphones.¹ If payphone providers were able to freely negotiate the rate at which they are compensated for the use of their payphones, this would undoubtedly constitute "fair compensation." APCC would agree that fair compensation is compensation entered into by a willing buyer and a willing seller of equal bargaining power where neither is compelled to enter into the transaction.

While Congress directed the FCC to ensure that payphone providers are "fairly compensated" for each and every completed interLATA and intraLATA call, the Commission does not have the option, under the current regulatory scheme, of relying on transactions entered into between a willing payphone provider and a willing end user, whether the end user is making a local coin call or a non-sent paid call.

¹ APCC does not agree with the RBOC coalition view that the Commission need not prescribe per call compensation for 0+ calls, as explained in APCC's comments.

At the local call level, there has, of course, been regulatory intervention to set the price at which the call can be made. As you are well aware, this rate generally has been set at a price substantially below average payphone costs per call. The Commission does have authority to preemptively deregulate the local coin rate and allow competitive forces to determine local rates as a means of ensuring fair compensation. APCC has urged a more modest course, setting a maximum rate of \$.40 to prevent "rate shock" and allowing the forces of competition to determine "fair compensation" within that protective umbrella.

There has also been regulatory intervention in the non-sent paid market. In enacting the Telephone Operator Consumer Services Improvement Act of 1990, Congress mandated that access code calling from payphones must be available to the public.² While APCC supported that legislation, the legal compulsion to allow access code calls has necessarily destroyed any opportunity for there to be a freely negotiated transaction between the payphone provider and the end user and/or the IXC who realizes the revenue from the non-sent paid call.

Under these circumstances, we believe that in establishing per call compensation, the Commission must, as it has proposed to do, look to proxies for what the freely negotiated rate between parties of equal bargaining power would be. The Commission identified such a proxy in its 1992 compensation order when it relied upon the average AT&T commission. The Commission reasoned that the commission was a transaction negotiated between two willing parties and therefore closely approximated a market result. The APCC generally endorses the Commission's reasoning in looking to a "proxy" for a freely negotiated rate. We would, however, point out that the bargaining power between independent public payphone providers and the large interLATA exchange carriers was not then equal and is certainly not equal today. See Comments of the APCC at 7-9 (attached for your convenience). As such, even the \$.40 relied upon by the Commission in 1992 was too low.

In the APCC's Comments, APCC addressed other proxies the Commission can rely upon for a market-based level of "fair compensation." I will not reiterate that discussion here as it is readily available. For purposes of this letter, APCC simply observes that other market-based proxies also are at or above the \$.40 level.

Turning to the legal definition of "fair compensation," APCC believes that market rates for comparable services are relevant to a determination of "fair compensation." This point was discussed in APCC's Comments and we will not reiterate that discussion here. See Comments of the American Public Communications Council at 31. Thus, like

² As explained in APCC's Comments, as a practical matter, the prohibition on blocking access code calls also precludes the blocking of 1-800 subscriber calls.

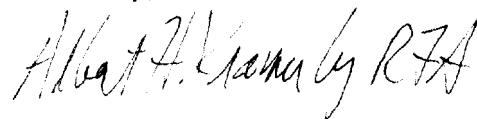
Mr. John B. Muleta
September 6, 1996
Page 3

the conceptual/economic definition of fair compensation, the legal concept of compensation begins from the notion of market-based surrogates. Certainly, in the "takings" context, it has been consistently recognized that fair or just compensation must be examined with reference to market factors. See, e.g., United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) ("The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of taking. . . .') (quoting Olson v. United States, 292 U.S. 246, 255 (1944)). We believe these concepts are equally compelling in the present context.

While we do not view costs as irrelevant to the notion of "fair compensation," we do not believe that looking to costs alone, whether the cost concept is of a fully embedded nature or of an incremental nature, can address "fair compensation." In the public utility context, and certainly in the context of the Communications Act, when Congress intended to refer to cost-based rates or compensation, it virtually always refers to rates that are "just and reasonable." E.g., 47 U.S.C. § 201(b), 47 U.S.C. § 205. "Fair compensation" extends beyond the notion of "just and reasonable" compensation. While "just and reasonable" may embrace cost notions, and, as stated above, cost notions are not necessarily irrelevant, "fair compensation" embraces broader notions of replicating market-based rates.

I hope that this is responsive to your inquiry. I apologize for the delay in responding.

Sincerely,

A handwritten signature in dark ink, appearing to read "Albert H. Kramer by RJA". The signature is fluid and cursive, with the initials "RJA" at the end.

Albert H. Kramer

AHK/rw
Enclosure